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Baltimore City Department of Social Services v. Bouknight: the Required Records Doctrine - Logic and Beyond

H. Bruce Dorsey

Notes

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES V. BOUKNIGHT: THE REQUIRED RECORDS DOCTRINE—LOGIC AND BEYOND

INTRODUCTION

In *Baltimore City Department of Social Services v. Bouknight*,[1] the Supreme Court held that a mother who is the custodian of her child pursuant to court order may not invoke the fifth amendment privilege against self-incrimination to resist a court order to produce her child.[2] Writing for the majority, Justice O'Connor reversed the Court of Appeals of Maryland,[3] which had vacated a civil contempt order against the mother, Jacqueline Bouknight, for her failure to produce her child. The Court denied Bouknight fifth amendment protection because she "assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime."[4]

This Note examines *Bouknight*'s effect on the fifth amendment self-incrimination privilege. *Bouknight* extends the "required records" doctrine to encompass compelled testimony outside of the realm of business documents.[5] Although *Bouknight* correctly disallowed using the privilege to resist the lower court's production order, the Court's reasoning and consequent extension of the required records doctrine was unwarranted. This Note examines the requirements of the privilege against self-incrimination, the development of the required records doctrine, and the *Bouknight* Court's reasoning in extending that doctrine. Finally, this Note offers an alternative to the Court's reasoning that would reach the same result in a less contrived manner.

I. FACTS OF THE CASE

Jacqueline Bouknight's son Maurice was three months old when

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1. 110 S. Ct. 900 (1990).

2. *See id.* at 903.

3. *See in re* Maurice M., 314 Md. 391, 550 A.2d 1135 (1988), *rev'd sub nom.* Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900 (1990).

4. *Bouknight*, 110 S. Ct. at 905.

5. Before *Bouknight*, the Court had limited use of the required records doctrine to business documents. *See infra* Part III.

he was hospitalized with a fractured leg.[6] Subsequent examination revealed other partially healed fractures.[7] Because of these injuries, and evidence that Bouknight mistreated the child even when he was in the hospital,[8] hospital personnel notified the Baltimore City Department of Social Services (DSS) that they suspected child abuse.[9] In February 1987, DSS persuaded a court to remove Maurice from Bouknight's control and to place him in foster care.[10] But the court subsequently modified the order, and returned custody temporarily to Bouknight.[11]

At an August 1987 hearing, the juvenile court determined that Maurice was a "child in need of assistance" (CINA).[12] This gave the juvenile court jurisdiction over Maurice, and the court placed him under DSS's continuing supervision.[13] The parties agreed that Maurice could remain in Bouknight's custody, subject to the extensive conditions of a protective supervision order requiring Bouknight to cooperate with DSS, to continue in therapy, and to refrain from physically punishing Maurice.[14]

By April 1988, DSS returned to juvenile court, alleging that Bouknight had refused to cooperate with DSS caseworkers and had violated nearly every other aspect of the protective order.[15] When Bouknight failed to produce Maurice or to reveal where he could be located, DSS petitioned the court to remove Maurice from her con-

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6. *Bouknight*, 110 S. Ct. at 903.

7. *Id.*

8. *Id.* Hospital personnel observed Bouknight shaking Maurice and dropping him into his crib even though he was in a cast. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *In re* Maurice M., 314 Md. 391, 394, 550 A.2d 1135, 1136 (1988), *rev'd sub nom.* Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900 (1990). The juvenile court made its finding pursuant to MD. CTS. & JUD. PROC. CODE ANN. § 3-801(e) (Supp. 1989), which reads:

> "Child in need of assistance" is a child who requires the assistance of the court because
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> (1) He is mentally handicapped or is not receiving ordinary and proper care and attention, and
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> (2) His parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems provided, however, a child shall not be deemed to be in need of assistance for the sole reason he is being furnished nonmedical remedial care and treatment recognized by State law.

Id.

13. *Bouknight*, 110 S. Ct. at 903.

14. *Id.*

15. *Id.*

trol and to place him in foster care.[16] On April 20, 1988, the juvenile court granted the petition, and cited Bouknight for violating the protective custody order and for failing to appear at the hearing.[17] The court later issued orders requiring Bouknight to show cause why she should not be held in civil contempt for refusing to produce Maurice.[18]

When Bouknight did not produce Maurice at subsequent hearings, the court found her in contempt and imprisoned her for failing to produce Maurice or to reveal his whereabouts.[19] Bouknight claimed the contempt order violated her fifth amendment guarantee against self-incrimination in that she was compelled to "verbally or physically produce incriminating statements or evidence."[20] The juvenile court rejected this claim, stating that the contempt order was issued not because she refused to testify, but because she failed to abide by the order for the production of Maurice.[21]

The Court of Appeals of Maryland vacated the juvenile court's judgment upholding the contempt order.[22] The Court of Appeals found that the juvenile court's contempt order compelled Bouknight to admit through the act of production a "measure of continuing control and dominion over Maurice's person"[23] in a situation in which "Bouknight had a reasonable apprehension that she will be prosecuted."[24]

The DSS applied for a stay of judgment, which Chief Justice Rehnquist granted in his capacity as Circuit Justice.[25] The Court subsequently granted DSS's petition for a writ of certiorari.[26]

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16. *Id.* at 903-04. BCDSS officials visited Bouknight on two other occasions: she first refused to reveal Maurice's whereabouts, and subsequently claimed that he was with an aunt whom she would not identify. *Id.*

17. *Id.*

18. *Id.* at 904.

19. *See In re* Maurice M., 314 Md. 391, 395-96, 550 A.2d 1135, 1137 (1988), *rev'd sub nom.* Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900 (1990).

20. *Id.* at 396, 550 A.2d at 1137.

21. *See Bouknight*, 110 S. Ct. at 904.

22. *See Maurice*, 314 Md. 391, 550 A.2d 1135.

23. *Id.* at 404, 550 A.2d at 1141.

24. *Id.* at 403-04, 550 A.2d at 1141. The Court of Appeals also determined that the balancing analysis used in California v. Byers, 402 U.S. 424 (1971), was inapposite. *See Maurice*, 314 Md. at 408, 550 A.2d at 1143. For a discussion of *Byers*, see *infra* notes 73-80 and accompanying text.

25. *See* Baltimore City Dep't of Social Servs. v. Bouknight, 488 U.S. 1301 (1988).

26. *See* Baltimore City Dep't of Social Servs. v. Bouknight, 109 S. Ct. 1636 (1989).

II. THE PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination is rooted in early English law,[27] and developed from the maxim, *nemo tenetur seipsum prodere*: no man is held to incriminate himself.[28] The fifth amendment prohibition against self-incrimination, applied to the states through the fourteenth amendment,[29] provides as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself."[30] Since its adoption in 1791, the Supreme Court has come to interpret the clause as protecting an individual from being compelled to make an incriminating testimonial communication.[31]

The development of the privilege was controversial, and attracted the attention of leading legal scholars.[32] But however heated the debate once was, the privilege is now an established and integral part of American criminal jurisprudence.[33] The Supreme Court has acclaimed the privilege and its importance to democracy:

> [W]e may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often tran-

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27. *See generally* E. CLEARY, MCCORMICK ON EVIDENCE § 114 (3d ed. 1984) (discussing the privilege and its roots in the English ecclesiastical courts); Bonventre, *An Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 BROOKLYN L. REV. 31, 35-38 (1982) (tracing the privilege to a fourteenth century statute in which Parliament forbade the clergy from interrogating laymen under oath in all matters except those involving marriages and wills).

28. The phrase has been attributed to many authors, from Sir Edward Coke to St. Chrysostomous to an unknown canonist. *See* Bonventre, *supra* note 27, at 36-37. *See also* Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 3 n.3 (1930) (discussing possible roots in canon law); Riesenfeld, *Law-Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103, 118 (1949) (suggesting St. Chrysostomous).

29. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (the fifth amendment privilege against compulsory self-incrimination extends to state action under the fourteenth amendment).

30. U.S. CONST. amend. V.

31. *See In re* Maurice M., 314 Md. 391, 398, 550 A.2d 1135, 1138 (1988) (citing United States v. White, 322 U.S. 694, 701 (1944)), *rev'd sub nom.* Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900 (1990).

32. These included Jeremy Bentham, John Wigmore, Roscoe Pound, Justice Benjamin Cardozo, and Judge Henry Friendly. *See* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 672-74 (1968); Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 7-8 (1986). *See also* E. CLEARY, *supra* note 27, § 114 (discussing Wigmore and Bentham); Bonventre, *supra* note 27, at 31 & n.1 (listing scholarly works on both sides of the debate).

33. *See, e.g.*, *Malloy*, 378 U.S. at 7 ("[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and the Fifth Amendment privilege is its essential mainstay.").

> scends its origins," the privilege has become rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy."[34]

But the privilege is not absolute. Three requirements must be met in order for the privilege to attach: the activity against which the privilege may be invoked must have a "real and appreciable" danger of incrimination, the communication must be testimonial, and it must be compelled.[35]

The risk of incrimination must be " 'real and appreciable,' and not merely 'imaginary and unsubstantial.' "[36] In *Brown v. Walker*,[37] the Supreme Court looked to English case law for the proposition that

> the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.[38]

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34. Miranda v. Arizona, 384 U.S. 436, 460 (1966) (quoting United States v. Grunewald, 233 F.2d 556, 579, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)). *See* Saltzburg, *supra* note 32, at 6.

> Elsewhere the Supreme Court has explained that the privilege is founded on our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," . . . ; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Doe v. United States (*Doe II*), 487 U.S. 201, 212-13 (1988) (quoting Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964)).

35. *See generally* E. CLEARY, *supra* note 27, §§ 123-25 (outlining the development of the requirements).

36. Marchetti v. United States, 390 U.S. 39, 48 (1968). *See generally* E. CLEARY, *supra* note 27, § 123 (development of the "real and appreciable" element).

37. 161 U.S. 591 (1896).

38. *Id.* at 599-600 (citing Queen v. Boyles, 1 B. & S. 311, 330, 121 Eng. Rep. 730, 738 (K.B. 1861)).

The communication must also be testimonial.[39] The Supreme Court qualified "testimony" for self-incrimination purposes by affirming in *Schmerber v. California*[40] that what is protected is "evidence of a testimonial or communicative nature."[41] Most recently, in *Doe v. United States* (*Doe II*)[42] the Court stated that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself."[43] The act of producing documents has been held to be communicative, enabling the producer to invoke the fifth amendment privilege.[44]

Finally, the testimonial activity must be compelled.[45] The privilege provides no protection to testimonial activities voluntarily undertaken, even if the government later seeks the product of the testimonial activity. The Court in *Fisher v. United States*[46] held that the privilege may not be asserted to resist compelled production of documents that were voluntarily made.[47] *Fisher* makes clear that there is no blanket proscription against compulsory production of items that may be incriminating to the person from whom they are demanded.[48]

III. THE REQUIRED RECORDS DOCTRINE

In addition to the general qualifications discussed above, doctrines such as the required records doctrine limit the privilege. In some circumstances, this doctrine denies fifth amendment protec-

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39. *See generally* E. CLEARY, *supra* note 27, § 124 (development of the "testimonial" element).

40. 384 U.S. 757 (1966) (an involuntary blood sample was not testimonial or communicative).

41. *Id.* at 761.

42. 487 U.S. 201 (1988) (consent directive authorizing banks to disclose records that petitioner refused to sign was not testimonial).

43. *Id.* at 209-10.

44. *See* Fisher v. United States, 425 U.S. 391, 410 (1976) ("The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced."). *See also* United States v. Doe (*Doe I*), 465 U.S. 605, 612-14 (1984) ("Although the contents of a document may not be privileged, the act of producing the document may be.").

45. *See generally* E. CLEARY, *supra* note 27, § 125 (development of the compulsion element).

46. 425 U.S. 391 (1976).

47. *See id.* at 410 n.11. ("The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege . . . [a]nd unless the Government has compelled the subpoenaed person to write the document . . . the fact that it was written by him is not controlling with respect to the Fifth Amendment issue." (citations omitted)).

48. *See* E. CLEARY, *supra* note 27, § 126.

tion to records kept in compliance with the law, even though the records might be incriminating.[49]

The Supreme Court first established the required records doctrine[50] in the landmark case *Shapiro v. United States*.[51] In *Shapiro*, the Court denied the defendant use of the privilege while sustaining his conviction for violations of price regulations.[52] The conviction was based on the defendant's business records, which the government required him to keep.[53] The Court held that the privilege against self-incrimination does not apply to "public documents, which the defendant was required to keep, not for his private uses, but for benefit of the public, and for public inspection."[54]

The Court's reasoning in *Shapiro* has been criticized.[55] The Court rested its decision in part on its view of an earlier case, *Wilson v. United States*.[56] Most discussion of *Wilson* centers on the proposition that corporations and their officers may not invoke the privilege.[57] Because the state creates and regulates corporations, the

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49. *See, e.g.*, Saltzburg, *supra* note 32, at 10.

50. *See id.*

51. 335 U.S. 1 (1948).

52. *See id.* at 19-20. Shapiro violated a provision of the Emergency Price Control Act. *Id.* at 3.

53. *See id.* at 5.

54. *Id.* at 17-18 (quoting State v. Donovan, 10 N.D. 203, 208-09, 86 N.W. 709, 711 (1901)). The *Shapiro* Court noted, however, that

> there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator.

Id. at 32. As the Court in *Marchetti* noted, *Shapiro* left those limits unexplored. Marchetti v. United States, 390 U.S. 39, 56 (1968).

55. *See* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 116 ("The limitations on the privilege that have been developed seem for the most part arbitrary and easily capable of being extended so as entirely to destroy the privilege. The *Shapiro* case is an example."); McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 216 ("The central difficulty with *Shapiro*, frequently noted, is its overbreadth.") (citations omitted); *See also* Mansfield, *supra*, at 148-49 (commenting that the decision was based on half-convincing explanations); Saltzburg, *supra* note 32, at 13-15 (commenting that Chief Justice Vinson cited almost no authority in discussing the privilege).

56. 221 U.S. 361 (1911).

57. *See infra* note 60; *see also Shapiro*, 335 U.S. at 56-67 (Frankfurter, J., dissenting) (detailed discussion of *Wilson* and the illustrative cases contained within); Saltzburg, *supra* note 32, at 12-13 (the *Shapiro* Court's interpretation of *Wilson* is supported by al-

privilege against self-incrimination cannot apply to custodians of corporate records.[58] The *Shapiro* Court, however, gave *Wilson* a different interpretation: the privilege did not attach to corporate documents because the law requires corporations to keep them for the public benefit.[59] Justice Frankfurter dissented, stating that "the authorities give no support to the broad proposition that because records are required by law to be kept they are public records and, hence, nonprivileged."[60]

After *Shapiro*, the Court intruded even further into the sphere of the fifth amendment privilege. Enlarging upon the opening it made with the required records doctrine, the Court upheld the Revenue Act's registration provisions[61] requiring gamblers to register and to pay occupational taxes, in *United States v. Kahriger*[62] and *Lewis v. United States*.[63]

In the mid-1960s the Court began limiting the scope of the re-

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most no authority). *But see* Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 709-12 (1951) (disagreeing with Justice Frankfurter's interpretation of *Wilson* and its illustrative cases).

58. *See* Hale v. Henkel, 201 U.S. 43, 74-75 (1906). This principle was extended to other associations of individuals (or collective entities) in United States v. White, 322 U.S. 694, 704 (1944) (principle applied to trade union).

59. See 335 U.S. at 16-18. *See* Saltzburg, *supra* note 32, at 13.

60. 335 U.S. at 64 (Frankfurter, J., dissenting). Justice Frankfurter also commented on *Wilson*:

> The *Wilson* case was correctly decided. The Court's holding boiled down to the proposition that "what's not yours is not yours." It gives no sanction for the bold proposition that Congress can legislate private papers in the hands of their owner, and not in the hands of a custodian, out of the protection afforded by the Fifth Amendment.

Id. at 58. Justice Rutledge dissented in *Shapiro* as well, interpreting *Wilson* differently than the majority:

> The *Wilson* case dealt only with corporate records, and the claim of a corporate officer having their custody to constitutional immunity against being required to produce them. None were required by law to be kept, in the sense that any federal law required that they be kept and produced for regulatory purposes.

Id. at 72 & n.2 (Rutledge, J., dissenting).

61. Professor Saltzburg suggested that *Shapiro* influenced Congress and provided the impetus for two new acts that "interpreted the Court's new doctrine broadly" and contracted the boundaries of the privilege: the Internal Security Act of 1950 (McCarran Act) and the Revenue Act of 1951. Saltzburg, *supra* note 32, at 15.

The McCarran Act, 50 U.S.C. §§ 781-858 (1982), imposed record-keeping and registration requirements on Communist organizations. *See* Saltzburg, *supra* note 32, at 17. The Revenue Act, ch. 521, 65 Stat. 452 (1951), imposed registration requirements and an occupational tax upon persons in the business of accepting wagers. *See* Saltzburg, *supra* note 32, at 15.

62. 345 U.S. 22 (1953).

63. 348 U.S. 419 (1955).

quired records doctrine. In *Albertson v. Subversive Activities Control Board*,[64] the Supreme Court found that requiring individuals to register with the government as members of the Communist Party violated the privilege.[65] Although *Albertson* did not mention *Shapiro*, it signalled a narrowing of the scope of the doctrine.[66] Further evidence of this trend came when the Court reconsidered the federal gambling tax registration requirements. Relying on the language of *Albertson*, the Supreme Court overruled its earlier decisions in *Kahriger* and *Lewis* in three companion decisions: *Marchetti v. United States*,[67] *Grosso v. United States*,[68] and *Haynes v. United States*.[69] In these cases the Court refused to apply the *Shapiro* doctrine[70] because the registration requirements were not imposed in "an essentially noncriminal and regulatory area of inquiry"[71] but rather upon a "selective group inherently suspect of criminal activities."[72]

In *California v. Byers*,[73] the Court considered the constitutionality of California's "hit-and-run" statute, which required drivers involved in accidents resulting in property damage to stop and give their names and addresses.[74] A plurality of the Court focused on the civil regulatory nature of a self-reporting requirement, this time

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64. 382 U.S. 70 (1965). The Court distinguished *Albertson* from United States v. Sullivan, 274 U.S. 259 (1927) (no privilege to resist a requirement to file an income tax return), noting that the income tax return filing requirements upheld in *Sullivan* "were neutral on their face and directed at the public at large," whereas in *Albertson* the requirements were "directed at a highly selective group inherently suspect of criminal activities." *Albertson*, 382 U.S. at 78-79.

65. *See* 382 U.S. at 71-74.

66. *See* Mansfield, *supra* note 55, at 116 ("*Albertson* stands at the threshold of an effort by the Court to re-examine this whole group of cases . . . ."); *see also* Friendly, *supra* note 32, at 717-18 (referring to "Albertson Unlimited" as exemplifying an onrush of privilege cases overtaking earlier decisions).

67. 390 U.S. 39 (1968) (registration of gamblers).

68. 390 U.S. 62 (1968) (registration of gamblers).

69. 390 U.S. 85 (1968) (registration of certain firearms).

70. *See Marchetti*, 390 U.S. at 56-57; *Grosso*, 390 U.S. at 68-69; *Haynes*, 390 U.S. at 98-99.

71. *Marchetti*, 390 U.S. at 57 ("It is enough that there are significant points of difference between the situations here and in *Shapiro* which in this instance preclude, under any formulation, an appropriate application of the 'required records' doctrine.") The Court in *Marchetti* found *Shapiro* inapplicable because of the absence of "three principal elements." *See id.* at 57. First, Marchetti was required to keep records other than the records he customarily kept. Second, there were no "public aspects" to the information demanded from Marchetti making it analogous to public documents. Finally, the requirements were directed at a selective group inherently suspect of criminal activities. *Id.*

72. *Id.*

73. 402 U.S. 424 (1971).

74. *See id.* at 426.

using elements developed in *Marchetti* and *Albertson*[75] in a balancing framework to find the requirement constitutionally valid.[76] The Court distinguished *Byers* from *Marchetti*, reasoning that the statute was "not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities"[77] and was directed at the public at large.[78]

A broad look at these later cases reveals a new doctrine taking shape.[79] The Court clarified this new doctrine in *Byers*: the fifth amendment privilege can be limited in the face of a generally applicable, civil regulatory requirement.[80] *Byers*, *Marchetti*, *Albertson*, and *United States v. Sullivan*[81] all considered the privilege in the context of civil regulations that required some kind of reporting or other act that communicates information to the government. These cases illuminate the limits of the new doctrine: *Byers* and *Sullivan* upheld acceptable reporting requirements; *Marchetti* and *Albertson* demonstrate requirements that violate the limits.

IV. THE REASONING OF *Bouknight*: Logic and Beyond

In *Bouknight*, the Supreme Court confronted an assertion of the fifth amendment privilege against self-incrimination in response to a contempt order compelling a mother either to produce her child or reveal his exact whereabouts. The order implicated the self-incrimination clause because the act of producing the child would by itself

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75. *See supra* note 71.

76. *See* 402 U.S. at 429-31; *infra* notes 80, 120 and accompanying text.

77. *Id.* at 430.

78. *See id.*

79. Justice Marshall recognized this doctrine as a distinct line of fifth amendment precedent having two common features: cases that "concern civil regulatory systems not primarily intended to facilitate criminal investigations" and that "target the general public." *Bouknight*, 110 S. Ct. at 912 (Marshall, J., dissenting).

80. *See* 402 U.S. at 430-31. This view accords with Justice Harlan's concurrence in *Byers*. Disagreeing with the majority's view that there was no substantial danger of incrimination in requiring a driver involved in an accident to stop and give his name and address, Justice Harlan preferred to

> deal in degrees . . . . The question whether some sort of immunity is required as a condition of self-reporting inescapably requires an evaluation of the assertedly noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required.

Id. at 454 (Harlan, J., concurring).

One legal scholar asserted that Harlan's analysis seems "more satisfactory and consistent with Fifth Amendment policies." *See* E. CLEARY, *supra* note 27, § 142, at 353 n.24.

81. 274 U.S. 259 (1927) (the fifth amendment privilege denied to a person resisting a requirement to file an income tax return).

testify to Bouknight's control over and possession of Maurice,[82] which possibly could be used against her in a later criminal case.[83] In delivering the Court's opinion, Justice O'Connor assumed that the act of producing the child was sufficiently incriminating and testimonial for purposes of the privilege.[84] Nevertheless, noting that the privilege is not always available,[85] Justice O'Connor denied Bouknight fifth amendment protection on two grounds. First, Bouknight assumed custodial duties that formed a basis for the order to produce Maurice, and second, production was required as part of a noncriminal regulatory regime.[86]

The majority justified its decision by noting that there were "several occasions" in which the Court had refused the privilege's invocation in the face of a "regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."[87] Framing the Court's analysis and decision in the language of *Shapiro* and *Marchetti*, Justice O'Connor explained the Court's denial by invoking the required records doctrine's limits on using the privilege.[88] She also cited *Byers* to support the general proposition that the "ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement."[89]

The majority's insistence on using the required records doctrine in *Bouknight* weakened the force of its reasoning. Justice Marshall, in dissent, effectively attacked the majority's analysis of the *Bouknight* facts using the logic of the required records doctrine. Justice O'Connor claimed that the *Shapiro* Court interpreted the princi-

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82. 110 S. Ct. at 905 ("The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced.") (citing *Doe II*, 487 U.S. 201, 209 (1988); *Doe I*, 465 U.S. 605, 612-14 & n.13 (1984); Fisher v. United States, 425 U.S. 391, 410-13 (1976)).

Although protection may be invoked for the act of complying with the demand, protection may not be had regarding the contents or nature of the thing demanded. *Bouknight*, 110 S. Ct. at 905 (citing *Doe I*, 465 U.S. at 612 & n.10; *id.* at 618 (O'Connor, J., concurring); *Fisher*, 425 U.S. at 408-10).

83. Justice O'Connor conceded that Bouknight's "implicit communication of control over Maurice at the moment of production might aid the State in prosecuting Bouknight." *See Bouknight*, 110 S. Ct. at 905.

84. *See id.*

85. *See id.*

86. *Id.*

87. *Id.*

88. *See id.* at 905-06.

89. *Id.* at 906.

ple in *Wilson* "as extending well beyond the corporate context."[90] But Justice Marshall called this interpretation "baffling."[91] The Court in *Shapiro* discussed cases involving noncorporate business records.[92] It defies logic to suggest that the extension made in *Shapiro* from corporate business records to noncorporate business records warrants extending the doctrine to include the compelled production of a child who is under a juvenile court's protective supervision order.

Justice O'Connor nevertheless bestowed upon Bouknight the mantle of custodian.[93] Justice Marshall correctly faulted the majority's eagerness to characterize Maurice's mother as a "custodian" in order to draw an easier connection between the *Bouknight* facts and the required records doctrine, which also uses the word.[94] The custody of a child is different from the custody of the records of a collective entity.[95] Justice Marshall, however, split hairs in his attempt to divest Bouknight of any characteristics of a custodian. Although he correctly noted that Maryland law defines a custodian as someone other than a parent or legal guardian,[96] he missed the point that, in common usage, a parent may be said to have "custody" of the child.[97] More significant, for the purposes of a contempt order, Maryland law treats parents, legal guardians, and custodians the same.[98]

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90. *Id.* at 907. The principle extracted from *Wilson*, in which the Court surveyed cases involving custody of public documents and records, is as follows:

> [W]here, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

Wilson v. United States, 221 U.S. 361, 382 (1911).

91. *Bouknight*, 110 S. Ct. at 910 & n.1 (Marshall, J., dissenting).

92. *See* 335 U.S. 1, 22-24 (1948).

93. *See Bouknight*, 110 S. Ct. at 907.

94. *See id.* at 910-11 (Marshall, J., dissenting). *But cf. infra* note 118 for the proposition that custodianship is not properly an element of the required records doctrine.

95. The custodial agreement Bouknight entered into "does not . . . confer custodial rights and obligations on Bouknight in the same way corporate law creates the custodial status of a corporate agent." *Bouknight*, 110 S. Ct. at 911 (Marshall, J., dissenting).

96. *See id.* at 910 (Marshall, J., dissenting); MD. CTS. & JUD. PROC. CODE ANN. § 3-801(j) (Supp. 1989) (defining custodian as "a person or agency to whom legal custody of a child has been given by order of the court, other than the child's parent or legal guardian.").

97. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 494 (2d ed. 1987) (defining custody as "keeping, guardianship, care").

98. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-814(c) (Supp. 1989):

> If a parent, guardian or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be

Although it denied the privilege on required records grounds, the Court strengthened its analysis by applying to *Bouknight* the limitations found in *Marchetti* and *Albertson*. In contrast to the governmental regulations that violated the privilege in those cases, the Court pointed out that Maryland imposes its production requirement as part of an "essentially noncriminal and regulatory area of inquiry."[99] Furthermore, persons who care for children pursuant to a custodial order do not constitute a "selective group inherently suspect of criminal activities."[100] Almost in passing, Justice O'Connor used *Byers* to justify denying the privilege, repeating that the regulation did not focus "exclusively on conduct which is criminal"[101] and cannot be characterized as an effort to gain testimony through the act of production.[102] The majority's analysis of the Maryland regulatory scheme is sound in spite of its application of the required records doctrine.

Justice Marshall's objection to the majority's characterization of Maryland's juvenile regulatory system is not as effective as his criticism of its attempt to stretch the required records doctrine. Justice Marshall disagreed with the Court's fifth amendment inquiry and its characterization of the Maryland regulatory scheme.[103] He objected to looking narrowly at the noncriminal purpose of the regulations, and instead advocated focusing on the regulations' practical ef-

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taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt.

Id.

99. *Bouknight*, 110 S. Ct. at 907. The Court based its distinction on a Maryland Code provision declaring the purpose of the general area of laws at issue to be essentially noncriminal:

> The purposes of the [Juvenile Causes] subtitle are: (1) To provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle; and to provide for a program of treatment, training and rehabilitation consistent with the child's best interests and the protection of the public interest . . . .

MD. CTS. & JUD. PROC. CODE ANN. § 3-802(a) (Supp. 1989).

100. *Bouknight*, 110 S. Ct. at 907 (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)). The Court focused on Maryland's statutory definition of CINA, which does not imply criminal conduct by parents, but only that they be "*simply* 'unable or unwilling to give proper care and attention to the child and his problems.'" *Id.* at 908 (citing MD. CTS. & JUD. PROC. CODE ANN. § 3-801(e) (Supp. 1989) (emphasis supplied)).

As Justice O'Connor correctly noted, although child abuse is often suspected in CINA hearings, under some circumstances a child is deemed to be a CINA absent any criminal suspicions. *See id.* at 907-08.

101. *Bouknight*, 110 S. Ct. at 908 (citing California v. Byers, 402 U.S. 424, 454 (1971) (Harlan, J., concurring)).

102. *See id.*

103. *See id.* at 910 (Marshall, J., dissenting).

fects.[104] He complained that under the majority's analysis, "virtually any civil regulatory scheme could be characterized as noncriminal."[105] But the converse appears more likely under Justice Marshall's analysis: virtually any civil regulatory scheme could be characterized as criminal. Justice Marshall would grant the use of the fifth amendment privilege because, as he saw it, Maryland's civil regime "*inevitably* intersects with criminal sanctions."[106]

Moreover, Justice Marshall asserted that the majority erred when it concluded that the civil requirement was directed at the general public.[107] Because the juvenile court has jurisdiction only over designated children, rather than over all children in the state, Justice Marshall argued that the civil regime is not broad enough to escape violation.[108] He found that the scheme narrowly targets parents who deny their children minimal care through abuse or neglect;[109] hence, in *Marchetti* terms, the scheme targets a "selective group inherently suspect of criminal activities."[110] Though Justice Marshall equated Maryland's juvenile system with the revenue system in *Marchetti*,[111] it actually is much closer to the regulation of drivers involved in traffic accidents discussed in *Byers*.[112] *Marchetti* addressed a federal wagering tax at a time when federal and state law widely prohibited gambling.[113] Because gambling was nearly always illegal, gamblers were inherently suspect of criminal activity. In contrast, the self-reporting requirement under scrutiny in *Byers*, though it defined some criminal offenses in the statutory text, was "essentially regulatory, not criminal."[114] Drivers who have traffic accidents are not a group highly suspect of criminal activities.[115]

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104. *See id.* at 912-13. Justice Marshall regarded the majority's characterization of the system as "dubious . . . highlight[ing] the flaws inherent in the Court's" analysis. *Id.* at 912.

105. *Id.*

106. *Id.* at 913 (emphasis in original). Justice Marshall also declared that the "State's goal of protecting children from abusive environments through the juvenile welfare system cannot be separated from criminal provisions that serve the same goal." *Id.* at 912-13.

107. *See id.* at 913.

108. *See id.*

109. *See id.*

110. *See id.* It is not clear how Justice Marshall justified interpreting § 3-801(e) to require "abuse." The statute only mandates that the child's parents, guardian, or custodian be "unable or unwilling to give proper care and attention to the child and his problems." *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-801(e)(2) (Supp. 1989).

111. *See id.* at 912.

112. *See* California v. Byers, 402 U.S. 424, 430 (1971).

113. *See* Marchetti v. United States, 390 U.S. 39, 44 & n.5 (1968).

114. *Byers*, 402 U.S. at 430.

115. *See id.* at 456 (Harlan, J., concurring) ("In contrast, the 'hit and run' statute in the

Likewise, Maryland parents whose children are found in need of assistance are not necessarily suspected of criminal abuse or neglect.[116]

The Supreme Court denied Bouknight fifth amendment protection on the problematic basis of the required records doctrine. Justice O'Connor unnecessarily left the Court's reasoning open to attack by squeezing *Bouknight* into the required records pattern. Justice Marshall, justified in exposing the unlikely reasoning and weaknesses of the majority's rationale, unfortunately lost sight of Maurice's interests.[117] Justice Marshall clearly was unhappy with any limitation on the fifth amendment privilege, with the notable exception of limitations on collective entities.[118]

V. A BETTER ALTERNATIVE

In *Bouknight* the Supreme Court missed an opportunity to establish a clear and simple doctrine governing limitations on the privilege against self-incrimination. The seeds of a better decision, however, lie within its text. Rather than forcing the required records analogy, the Court could have arrived at a more credible result by adopting and broadening the *Byers* rationale. A majority in

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present case predicates the duty to report on the occurrence of an event which cannot, without simply distorting the normal connotations of language, be characterized as 'inherently suspect'; *i.e.*, involvement in an automobile accident with property damage.")

116. *See supra* notes 99-100 and accompanying text. *See also In re* Maurice M., 314 Md. 391, 419, 550 A.2d 1135, 1148 (1988) (McAuliffe, J., dissenting) ("the thrust of the juvenile laws of this State is not criminal, but protective."), *rev'd sub nom.*, Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900 (1990). Compare this view with the characterization of California's hit-and-run statute, *supra* note 114 and accompanying text.

117. Arguably, the primary interest at stake in *Bouknight* is the protection of children. *See infra* note 130 and accompanying text.

118. Justice Marshall recognized "the well-established principle that a collective entity, unlike a natural person, has no Fifth Amendment privilege against self-incrimination." *Bouknight*, 110 S. Ct. at 911 (Marshall, J., dissenting) (referring to Hale v. Henkel, 201 U.S. 43, 69-70 (1906); Wilson v. United States, 221 U.S. 361, 384-85 (1911); United States v. White, 322 U.S. 694, 701 (1944)).

Justice Marshall criticized the Court's use of *Shapiro* to justify denying the privilege to Bouknight. Because *Shapiro* "did not rest on the existence of an agency relationship between a collective entity and the custodian of its records," he asserted that *Shapiro* "is properly analyzed with the cases concerning testimony required as part of a noncriminal regulatory regime, rather than with the cases concerning testimony compelled from custodians of collective entities' records." *Bouknight*, 110 S. Ct. at 910 n.1.

Justice Marshall's point is well-taken in that *Shapiro* did not involve assertion of the privilege by a custodian of a collective entity's records. His implication, however, that the collective entity line of cases is clearly distinct from the required records doctrine overlooks the fundamental entanglement of the two, given *Shapiro*'s reliance upon *Wilson*. *See supra* notes 55-59 and accompanying text.

Byers supported a balancing test between the public need to limit the privilege and the individual's constitutional right.[119] Lower federal courts have used a *Byers-Albertson* analysis in scrutinizing other regulatory requirements,[120] and at least one leading commentator also favors this approach.[121] The Court should have used the *Byers* decision to deny Bouknight the privilege because it rests on broader principles and provides a flexible balancing text.

Applying a balancing test to the case yields the same result as the *Bouknight* judgment. As the dissent in *In re Maurice M.* found, there is in this case the "strongest possible public policy in favor of protecting children, clearly outweigh[ing] the limited cost of denying the application of the privilege."[122] Considering the State's interest in protecting children,[123] as well as its statutory mandate to

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119. *See Byers*, 402 U.S. at 427. The plurality opinion of Chief Justice Burger reads:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Id.

With the concurring opinion of Justice Harlan, five justices advocated using a balancing test in compelled disclosure cases. Only Justice Harlan, however, actually engaged in a balancing test in *Byers*. *See id.* at 454-58 (Harlan, J., concurring). The plurality found that the risk of self-incrimination involved in the California accident reporting requirement was not substantial, making a balancing test unnecessary. *See id.* at 430-31.

120. *See* United States v. Des Jardins, 747 F.2d 499, 507-09 (9th Cir. 1984), *modified on other grounds*, 772 F.2d 578 (9th Cir. 1985) (upholding Bank Secrecy Act reporting requirements); United States v. Dichne, 612 F.2d 632, 638-41 (2d Cir. 1979) (same) *cert. denied*, 445 U.S. 928 (1980); United States v. Stirling, 571 F.2d 708, 727-28 (2d Cir.) (federal securities laws upholding regulatory disclosure requirements), *cert. denied*, 439 U.S. 824 (1978); United States v. Parente, 449 F. Supp. 905, 910-14 (D. Conn. 1978) (upholding federal statute provisions requiring liquor dealers to pay a special tax).

121. *See* E. CLEARY, *supra* note 27, § 142.

> The best approach seems simply in recognizing the doctrine as a limitation on the privilege based upon the public need for information in limited circumstances to make effective public regulation of certain activities. Thus in a specific case the question becomes whether there is sufficient public interest to outweigh the strong policy in favor of maintaining the protection of the privilege.

Id.

122. 314 Md. 391, 418, 550 A.2d 1135, 1148 (1988) (McAuliffe, J., dissenting), *rev'd sub nom* Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900 (1990). Judge McAuliffe followed the *Byers* approach, noting that "[t]he gist of the *Albertson-Byers* principle is that a common-sense approach to the application of even the most important constitutional rights is appropriate." *Id.* at 419, 550 A.2d at 1149.

123. *See infra* note 130 and accompanying text.

do so, it is difficult to avoid concluding that Bouknight should not have been allowed to invoke her fifth amendment privilege at the expense of the life or well-being of her child.

It is noteworthy that prior to the decision, it appeared the Court might apply a *Byers* analysis in *Bouknight*.[124] Its failure to do so, though, is neither inexplicable nor surprising. If the Court had established a clear balancing test for the privilege, it could have suggested a dangerous crack in the fifth amendment's foundation.[125] It was safer for the Court to squeeze *Bouknight* into an established limiting precedent than to announce a potentially sweeping limitation on the scope of the fifth amendment privilege.

The scope of the Court's consideration of fifth amendment principles in *Bouknight* was narrow. Though the Court held that Bouknight could not invoke the privilege against self-incrimination to resist the production order, it refused to decide whether she could later invoke the privilege in a criminal prosecution.[126] Justice O'Connor noted, however, that limitations on the use of her compelled testimony were not foreclosed.[127] If the opinion is viewed as merely denying the privilege to resist a contempt order, limitations on its use in a criminal proceeding present an altogether different issue. Justice O'Connor hinted that the privilege might still be available to Bouknight should the state attempt to use the fruits of the production order in a criminal prosecution.[128] Accordingly, Justice Marshall was somewhat assuaged by the Court's position, though he would have preferred that the Court adopt a positive statement of exclusion.[129]

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124. The dissent's reasoning in *Maurice* and Chief Justice Rehnquist's reasoning in granting the stay of judgment, focused chiefly on a *Byers* analysis. *See Maurice*, 314 Md. at 416-19; Baltimore City Dep't of Social Servs. v. Bouknight, 488 U.S. 1301, 1304-05 (1988). According to Chief Justice Rehnquist: "protecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents." *Id.* at 1305.

125. In the words of Justice Black, "vesting such power in judges to water down constitutional rights does indeed 'embark us' on . . . 'uncharted and treacherous seas.'" California v. Byers, 402 U.S. 424, 463 (1971) (Black, J., dissenting).

126. *See Bouknight*, 110 S. Ct. at 908.

127. *See id.* ("The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony.").

128. *See id.* Justice O'Connor cited cases demonstrating that "[i]n a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled." *Id.* at 909.

129. *See id.* at 914 (Marshall, J., dissenting).

> I take some comfort in the Court's recognition that the State may be prohibited from using any testimony given by Bouknight in subsequent criminal proceed-

CONCLUSION

In *Bouknight* the Supreme Court extended the required records doctrine to encompass the compelled production of a child pursuant to a custodial order. The decision illustrates the Court's reluctance to tread heavily on the fifth amendment, but at the same time it advances an important societal goal. The Court has a history of breaking new ground in constitutional analysis where the interests of children are concerned.[130]

Nevertheless, *Bouknight*'s jurisprudence is flawed. Extending the required records doctrine beyond the realm of business documents calls into question not only the precedents the Court relied upon, but also the Court's analysis of fifth amendment issues. The observation of Justice Jackson, dissenting in *Shapiro*, is appropriate:

> Today's decision introduces a principle of considerable moment. Of course, it strips of protection only business men and their records; but we cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice "to the limits of its logic."[131]

Justice Jackson's fears have been realized. The required records doctrine, approved in *Shapiro*, has reached the limits of its logic, and passed beyond, in *Bouknight*.

H. BRUCE DORSEY

> ings . . . [though] I am not content to deny Bouknight the constitutional protection required by the Fifth Amendment *now* in the hope she will not be convicted *later* on the basis of her own testimony.

Id. (emphasis in original).

130. In Belloti v. Baird, 443 U.S. 622 (1979), Justice Powell noted the Court's special concerns for children:

> The Court has long recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: "Children have a very special place in life which the law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." May v. Anderson, 345 U.S. 528, 536 (1953) (concurring opinion). The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.

Belloti, 443 U.S. at 633-34.

More recently, the Court demonstrated its concern for children by rejecting a claim that using one-way television for child witnesses in a child sexual abuse case violated the sixth amendment confrontation clause. Maryland v. Craig, 110 S. Ct. 3157 (1990).

131. 335 U.S. 1, 70 (1948) (Jackson, J., dissenting).